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Nos. 85-1936, 85-1942, and 85-1950

In the Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
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LORD ELECTRIC COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

W.V. PANGBORNE AND CO., INC., AND
J.A. BRUCE PINNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

SARGENT ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, on the facts as found by the district court, the conspiracy charged in the indictment was not part of a larger conspiracy for which petitioners had been previously placed in jeopardy.

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OPINIONS BELOW

The opinion of the court of appeals (85-1942 Pet. App. 1a-35a) is reported at 785 F.2d 1123. The opin-

ion of the district court (85-1942 Pet. App. 36a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1986. Petitions for rehearing were denied on April 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 19, 1984, a grand jury in the Eastern District of Pennsylvania indicted petitioners Sargent Electric Company (Sargent), Lord Electric Company, Inc. (Lord), W.V. Pangborne and Co., Inc. (Pangborne), and J.A. Bruce Pinney, Pangborne's Executive Vice-President, for violating Section 1 of the Sherman Act, 15 U.S.C. 1. The district court dismissed the indictment, holding that the conspiracy charged was part of a larger conspiracy for which petitioners had previously been convicted and that the indictment was thus barred by the Double Jeopardy Clause. The court of appeals reversed. 85-1942 Pet. App. 2a-3a.

1. The indictment charged the petitioners with conspiring to rig bids on electrical construction projects at United States Steel Corporation's Fairless Hills plant in Bucks County, Pennsylvania (Fairless). Petitioners Sargent and Lord claimed that the conspiracy was part of a larger conspiracy that included rigging bids at United States Steel facilities in Western Pennsylvania (Western Pennsylvania Works) for which they previously had been convicted. Petitioners Pangborne and Pinney claimed that the Fairless conspiracy was part of a larger conspiracy that included bid rigging at Gulf Oil Company in

Philadelphia (Gulf) to which they had pleaded nolo contendere. 85-1942 Pet. App. 3a-4a.

The district court held that there had been a single conspiracy to rig bids, which encompassed bid rigging not only at Gulf, Fairless, and the Western Pennsylvania Works, but also at Lukens Steel in Coatesville, Pennsylvania, the Atlantic Richfield Refinery in Philadelphia, and the Sun Oil Company in Marcus Hook, Pennsylvania. The court acknowledged that the bid-rigging activities at these separate locations involved significantly different companies and individuals (85-1942 Pet. App. 41a-43a);[1] that the activities at the separate locations began and ended at different times and for different reasons (*id.* at 39a, 43a); that for each location there were separate bid-rigging meetings (*id.* at 39a-40a, 54a); and that for each location there was a separate system for allocating work (*id.* at 40a). Thus, although the conspirators tried to allocate the work evenly among themselves at each location, jobs were never traded off between Fairless and any other facility, even when the same companies bid at more than one location (*ibid.*). The district court also acknowledged that some of the companies it considered major participants in a broad conspiracy were actually bidding competitively at some of the locations encompassed in the supposed broad conspiracy (*id.* at 43a-44a, 53a).

Despite these facts, the district court found the existence of a single conspiracy to rig bids "wherever and whenever possible" (85-1942 Pet. App. 55a). The court relied on the participation of some of the

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[1] At each of these locations the company soliciting bids for electrical construction work had a list of invited bidders, and a company could not bid unless it was on the bid list for that project (85-1942 Pet. App. 37a-38a).

conspirators in several schemes[2] and the common objective of all schemes, *i.e.*, to rig bids (*id.* at 49a-50a, 52a).

2. On appeal, none of the petitioners attempted to defend the district court's conclusion that there was a single conspiracy that linked Western Pennsylvania, Gulf, and Fairless. Each petitioner tried to tie the Fairless conspiracy to the particular conspiracy for which it had previously been prosecuted—*either* Western Pennsylvania *or* Gulf—but none seriously argued that there was a conspiracy that linked Western Pennsylvania *and* Gulf.[3]

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[2] No company or individual participated at every location (see 85-1942 Pet. App. 41a-43a). Although the district court's chart (*id.* at 42a, 43a) shows one company, Foley, as a "participant" at all locations, that is apparently a typographical error, for the district court found that Foley did not rig bids at Lukens Steel (*id.* at 44a, 51a-52a).

[3] See court of appeals briefs: Lord Br. 4 n.5; Sargent Br. 10-11; Pangborne Br. 6 n.5.; Pinney Br. 4 n.4; see also 85-1942 Pet. 10-11 (continuing to argue for a "Philadelphia area" conspiracy); 85-1950 Pet. 3 (emphasis added) (claiming district court found "one conspiracy to rig bids for all electrical construction projects *at United States Steel Corporation*, regardless of the location of the project"). Indeed, the record forcefully negates any link between Gulf and Western Pennsylvania. Not a single individual was common to both schemes. And, although the Howard P. Foley Company participated in both conspiracies, Foley's representative in the Gulf bid rigging, Herbert Geuther, was not even aware that bid rigging was occurring at the Western Pennsylvania Works. C.A. App. 627. Even Paul Arbogast, the officer who led Lord's bid rigging, testified in the district court that, in his view, the bid-rigging conspiracy encompassed only U.S. Steel Corporation jobs (*i.e.*, Fairless and the Western Pennsylvania Works); he did not place any other "Philadelphia area" sites in this conspiracy. 85-1942 Pet. App. 19a n.8.

The court of appeals reversed by a 2-1 vote, with each judge writing separately. Judge Gibbons "accept[ed] as true the underlying facts" as found by the district court (85-1942 Pet. App. 14a). He determined, however, that the district court's conclusion that there was a single conspiracy was either a finding of fact that was inconsistent with the historical and narrative facts and thus clearly erroneous, or an erroneous conclusion of law (*id.* at 14a-16a & n.3). Judge Gibbons also analyzed the relevant market in light of the district court's factual findings and concluded that the participants in the broad conspiracy defined by the district court were not competitors or potential competitors of each other at many of the locations encompassed in that conspiracy. In these circumstances, Judge Gibbons believed that the existence of a single overarching conspiracy could not be inferred from the circumstantial evidence in this case (*id.* at 7a-8a, 15a).

Judge Stapleton also accepted the underlying findings of the district court and concluded that the evidence compelled the conclusion that defendants had engaged in site-by-site bid rigging rather than a single overarching conspiracy (85-1942 Pet. App. 17a-19a, 20a-21a).[4]

Judge Adams dissented, concluding that, although "the record might support an inference that multiple conspiracies existed" (85-1942 Pet. App. 34a), the district court's finding of a single conspiracy was not clearly erroneous.

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[4] Judge Gibbons specifically joined in Judge Stapleton's analysis of "the absence of evidence which could justify a finding of a single overreaching [*sic*] conspiracy." 85-1942 Pet. App. 14a n.3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Although petitioners attempt to convert statements by individual judges of the court of appeals into legal holdings with far-reaching implications, the only question truly presented by this case—and the question treated as decisive by each of the three judges—is whether, under all the circumstances, the Fairless conspiracy was part of an overarching conspiracy for which petitioners had previously been placed in jeopardy. The answer to that question depends, of course, on the unique facts of this case. See *Blumenthal* v. *United States*, 332 U.S. 539, 553-559 (1947). The majority of the court of appeals, accepting findings of underlying fact made by the district court, correctly determined that the district court's inference of a single overarching conspiracy was clearly erroneous.

1. Both Judge Gibbons and Judge Stapleton recited in detail the facts, either undisputed or specifically found by the district court, that compelled the conclusion that there were separate conspiracies. As Judge Gibbons observed (85-1942 Pet. App. 15a):

> The district court found that at each facility there were separate bid lists; that the purchasers, not the bid-riggers, controlled access to those bid lists; that the membership of different lists was not identical; that some firms qualified to bid at more than one facility did not rig bids at all of them; that separate bid-rigging meetings were held with respect to each facility; that the allocation of business among the bid-riggers was made on a facility-by-facility basis; that not all the conspiring personnel knew each other; that

> the bid-rigging commenced at each facility at different times; and that bid-rigging ended at each facility at different times and for different reasons.

Judge Stapleton noted (85-1942 Pet. App. 17a-19a (footnotes omitted)):

> The trial court found or the undisputed evidence demonstrated (1) that there was a different group of bidders at each site; (2) that separate bid rigging meetings were held, and separate records maintained, for each site; (3) that precautions taken against discovery varied; (4) that the allocation of business at Western [Pennsylvania] Works, Fairless, Gulf and virtually all other sites was made exclusively on a site-by-site basis despite the feasibility of trade-offs between sites as demonstrated by those which occurred between Western [Pennsylvania] Works and Jones & Laughlin Steel; (5) that the method for designating the low bidder varied; (6) that some firms qualified to bid at more than one site did not rig bids at all of them; (7) that not all of the conspiring personnel knew one another; (8) that several of the purported "core" conspirators did not know that bid rigging was going on elsewhere than at their particular location; (9) that the bid rigging commenced at each site at a different time; and (10) that the bid rigging ended at each facility at different times and for different reasons.[5]

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[5] Immediately after setting forth these extensive, undisputed facts, each judge noted that the recited facts compelled a conclusion that there were multiple conspiracies in the absence of "others pointing the other way" (85-1492 Pet. App. 15a) or "unambiguous evidence suggesting an overarching conspiracy" (*id.* at 19a). Taking this latter phrase out of context, Lord and Pangborne assert that the court of appeals im-

Petitioners cite other cases involving some of these factors, but they point to no case in which a finding of a single conspiracy has been allowed to stand in the face of all (or nearly all) of these factors demonstrating the existence of multiple conspiracies (see 85-1936 Pet. 11-12; 85-1942 Pet. 13-15; 85-1950 Pet. 11-12). In *United States* v. *Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), the "single conspiracy" found was one in which, for 25 years, the conspirators rigged bids submitted to a single customer, the Kansas Department of Transportation. Obviously, that case did not involve facts, like those recited above, indicating the existence of overlapping but distinct conspiracies involving different customers and facilities. The argument that the court rejected in *Beachner* was that there was a separate conspiracy each time the Kansas Department of Transportation let new bids (729 F.2d at 1283). That argument was not made in this case and is not the basis of the decision of the court of appeals (see pp. 18-19, *infra*).

In *United States* v. *David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980), there is no indication in the court's opinion that the bid riggers' work allocations were separate for each customer or that par-

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properly placed the burden of proof on defendants (85-1936 Pet. 14-15; 85-1942 Pet. 9 n.2). The assertion is wholly without merit. The recited facts showed that the government had amply met its burden of proof, and Judge Stapleton remarked only on what it would have taken, in the face of the government's evidence, to support the district court's contrary conclusion. Moreover, by placing the burden of proof on the government (see 85-1942 Pet. App. 4a (citing *United States* v. *Inmon*, 568 F.2d 326, 331-332 (3d Cir. 1977))), the Third Circuit was actually more generous to petitioners than some other circuits (see 85-1936 Pet. 15).

ticipants in the conspiracy were simultaneously rigging bids for one customer's jobs and bidding competitively for other customers' jobs, as in this case. Indeed, the argument that separate customers or facilities were the objects of separate conspiracies was not even made; the argument the court rejected was that the original conspiracy died in 1970 and a new one began in 1972 with the same core participants but some shifts in membership. 621 F.2d at 1151-1152. As in *Beachner*, the court also rejected "appellant's claim that each incident of bid rigging was approached on an isolated, *ad hoc* basis" (*id.* at 1152).

Finally, in *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978), the existence of a nationwide conspiracy was conceded, and Consolidated's argument was that it was not part of that conspiracy. The case stands for the proposition that one may join a conspiracy without knowing all its members or participating in every price-fixing incident; the case says nothing about what facts indicate a single conspiracy and what facts indicate multiple conspiracies.[6]

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[6] Lord alone (85-1936 Pet. 11, 12) relies on *United States* v. *Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982). In that case, the defendant claimed that "economic feasibility would not allow [it] to bid on contracts originating in Virginia Beach," but the evidence showed that it *had* "agreed to the allocation of contracts and the rigging of bids with companies based in Norfolk and Virginia Beach" (694 F.2d at 319). Moreover, illegal territorial allocation was part of the conspiracy alleged and proved in that case (*ibid.*), and a conspiracy to allocate territories obviously must be treated as one conspiracy, not a separate conspiracy in each territory. And again, the case did not involve critical factors present in this case, such as the absence of tradeoffs between

In sum, the decision below turns on the unique facts of this case and does not conflict with any decision of another court of appeals. Judges Gibbons and Stapleton reached the ultimate issue by somewhat different paths, but both concluded that the undisputed facts, and the facts found by the district court, required a determination that there were multiple conspiracies. That determination does not warrant review by this Court.

2. a. Petitioners claim that the Court should grant certiorari to review a conflict in the circuits as to the application of the "totality of the circumstances" and "same evidence" tests (85-1936 Pet. 12-14; 85-1950 Pet. 9-11). However, even though the Third Circuit has not expressly adopted the "totality of the circumstances test" used in other circuits, Judges Gibbons and Stapleton each examined the totality of the facts in detail; neither relied on the mere fact that the allegations of the indictment could not be proved using the "same evidence" as would prove the allegations of the previous indictments (see, *e.g.*, 85-1942 Pet. App. 10a-14a, 17a-20a).

Indeed, Judge Adams recognized in his dissent (85-1942 Pet. App. 31a) that in practice the Third Circuit has followed the other circuits in employing the totality-of-the-circumstances approach, although it has not expressly adopted it. Thus there is no conflict in the circuits for the Court to resolve.[7]

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different locations and the simultaneous participation of some conspirators in schemes at one place and nonparticipation by the same parties in schemes at other places.

[7] Sargent appears to acknowledge that the courts of appeals are in agreement in following the totality-of-the-circumstances approach and that the approach is correct. Sargent nonethe-

b. Petitioners claim (85-1936 Pet. 15-16; 85-1942 Pet. 10-11) that the decision of the court of appeals conflicts with *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985). Unlike the lower court in *Bessemer City*, however, the court here did not undertake a de novo review of the record, reweigh the credibility of witnesses, or displace the district court's findings with its own assessment of the facts. *Bessemer City*, slip op. 11, 12.[8] Indeed, Judges Gibbons and Stapleton expressly accepted the district court's findings of historical and narrative fact (85-1942 Pet. App. 15a, 19a). As Judge Gibbons put it, those "historical or narrative facts found by the district court require a holding that the United States established, as a matter of law, that the bid-rigging at the different facilities constituted multiple Sherman Act offenses" (*id.* at 15a).

All that the majority of the court of appeals rejected were the district court's speculative "explanations" and conclusions, which the historical and narrative facts either failed to support or flatly contradicted. For example, Judge Gibbons noted (85-1942 Pet. App. 13a) that, "[w]hile observing that '[t]he parties' relationships at one facility depended upon their relationship at the others,' the district court discounted the undisputed fact that The Foley Co. did

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less asks this Court to grant certiorari because *it* has never adopted this standard (85-1950 Pet. 10-11). Since Sargent does not point to a misapplication of this Court's standards or any claimed conflict in the standards adopted by the circuits, Sargent's plea for the Court to set a standard should be rejected.

[8] Judge Gibbons explicitly recognized that the court was not free to "select among competing permissible inferences" from the factual record (85-1942 Pet. App. 6a).

not rig bids at Western Works or at Lukens Steel while it participated in bid-rigging at [Gulf and Fairless]."[9] Similarly, the majority credited the district court's factual conclusion that the separate schemes began and ended at different times and for different reasons. What the majority did not accept was the district court's "explanation" that the inference of separate conspiracies was negated because the schemes ended for reasons that were beyond the conspirators' control. As Judge Gibbons noted, the very absence of control (and the fact that each scheme was able to succeed independent of any other) is "strong evidence of the absence of interdependence among the separate markets and thus undercuts the [district] court's ultimate conclusion that the participants acted pursuant to a single overarching conspiracy" (85-1942 Pet. App. 14a). The majority also concluded that the district court had unduly emphasized that each scheme had the "common objective" (*id.* at 52a) of price fixing,[10] while discounting most of its other findings that negated the exist-

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[9] See also 85-1942 Pet. 11 & n.4 (relying on the same faulty premise as the district court). Pangborne also claims that a single conspiracy should be inferred because four contractors "did most of the bidding" at Arco, Gulf, Sun, Lukens, and Fairless (but not the Western Pennsylvania Works) (*id.* at 10). But one of those four contractors was Foley, which was bidding competitively at Lukens at the same time it was rigging bids at other facilities. Thus, the behavior of those four contractors was more consistent with the hypothesis of separate, facility-by-facility conspiracies than with the hypothesis of interdependent schemes at the different facilities.

[10] If a "price fixing" objective were sufficient to link conspiracies involving different participants, times, locations, and activities, then most Sherman Act indictments in the country would be part of a single conspiracy.

ence of a common scheme, *e.g.*, the differences in meeting places, the differences in the manner in which bids were submitted, the differences in time periods, and the fact that some so-called "core conspirators" (85-1942 Pet. App. 50a) were *not* rigging bids everywhere they could (*id.* at 13a, 17a-19a).[11]

This Court observed in *Bessemer City* that " 'a [factual] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been made.' " Slip op. 8 (emphasis added) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The majority followed that principle in concluding that, in light of the entire record, the facts found by the district court could not as a matter of law establish a single conspiracy (85-1942 Pet. App. 15a, 20a-21a). That conclusion does not warrant further review.

3. a. Petitioners contend that Judge Gibbons' statements about "relevant markets" (85-1942 Pet. App. 7a-8a) conflict with prior decisions of this Court and other courts of appeals that hold that proof of the relevant market is not an essential element of a per se Sherman Act violation (85-1936 Pet. 9-12; 85-1942 Pet. 7-9; 85-1950 Pet.

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[11] Both Lord and the Foley Company were bidding competitively at Lukens (85-1942 Pet. App. 13a, 33a, 42a, 51a-52a). Foley also discontinued its participation in the Western Pennsylvania Works conspiracy while continuing to rig bids at Fairless and other places (*id.* at 43a, 53a). And another so-called "core conspirator," the Ortlip Company, did not rig bids at the Western Pennsylvania Works because Ortlip was "distrust[ed]" by the Western Pennsylvania Works conspirators (*id.* at 50a).

6-9).[12] But dicta in the opinion of a single judge do not merit this Court's review. "This Court * * * reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). And, although Judge Gibbons used the phrase "relevant markets" imprecisely, his remarks about "relevant markets" do not undermine his conclusion that the evidence as a whole showed multiple conspiracies.

Judge Gibbons concluded that one of the circumstances relevant to determining whether there was one conspiracy or several was whether the conspirators focused on one large "market" or several distinct "markets." This was not error.[13] To the contrary,

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[12] Sargent states that "it is undisputed that persons accused of conspiracy under Section 1 of the Sherman Act must be actual or potential competitors" and that "the terms 'relevant market' and 'competitors' may at first blush seem to be identical,' " but Sargent quarrels with the "narrow" way in which Judge Gibbons "defined" relevant market (85-1950 Pet. 7). Sargent then offers a "hypothetical" to show why Judge Gibbons' market definition could be incorrect in some cases (*id.* at 8). But that hypothetical is not this case; and, as noted at pp. 6-7, *supra*, Judge Gibbons relied on considerably more than the proposition that a contractor not on a bid list is not a "potential competitor."

[13] Judge Gibbons did not, as petitioners imply, state that proof of a relevant market is essential in all Section 1 cases; no such question was presented in this case. Judge Gibbons expressly acknowledged that proof of a relevant market is not essential to prove a violation when evidence of a horizontal agreement exists: that evidence, of itself, "tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an inference that it would have an effect in a relevant market." 85-1942 Pet. App. 7a-8a; accord,

applying the "totality of the circumstances" approach to determine whether the district court properly inferred the existence of a single large conspiracy from the circumstantial evidence in this record, Judge Gibbons correctly stated that companies that are not actual or potential competitors have little incentive to agree to rig bids because "there would be no point to such an agreement." 85-1942 Pet. App. 7a.[14] A pattern of bid rigging is less likely to be part of a single conspiracy when, as in this case, the participants in the alleged single conspiracy are not actual or potential competitors with respect to many of the contracts that are rigged.[15]

Neumann v. *Reinforced Earth Co.*, 786 F.2d 424, 428 (D.C. Cir. 1986) (Bork, J.); see also *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 12 (quoting *NCAA* v. *Board of Regents*, 468 U.S. 85, 109-110 (1984) ("absence of proof of market power does not justify a naked restriction on price or output")). The issue in this case, however, is not whether there was an agreement but instead what the scope of the agreement or agreements was (see 85-1942 Pet. App. 8a).

[14] As Judge Adams acknowledged in his dissent (85-1942 Pet. App. 25a), "it seems unlikely that a situation would actually arise in which two conspirators that are truly not in competition would agree to engage in an anticompetitive practice when that agreement could in no way benefit either conspirator."

[15] Pangborne argues (85-1942 Pet. 11) that "the Court of Appeals" (*i.e.*, Judge Gibbons) erred in concluding that the participants in the district court's conspiracy are not potential competitors, claiming that "all the defendants competed for jobs in the Philadelphia area." But the district court found that there was a conspiracy encompassing more than the "Philadelphia area" (see note 3, *supra*). According to the district court, the conspiracy encompassed bid rigging in Western Pennsylvania and "wherever * * * possible" (85-1942

Other courts have similarly relied on market factors to determine the scope of a Sherman Act conspiracy. In *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), the defendants had claimed that their conspiracy to fix poultry prices in New England was part of a conspiracy to fix poultry prices in Ohio. The court noted that, even "[a]ssuming that First National did establish and attempt to execute an overall plan to fix prices in each of its regional markets, success in each depended upon its ability to achieve agreements with two distinct sets of competitors and upon the response of two distinct consumer markets to the implementation of such agreements. Such functional independence reflects two conspiracies, not one." 771 F.2d at 663. *Korfant* thus lends strong support to the decision of the court of appeals

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Pet. App. 55a). Moreover, even in the localities encompassed in the "Philadelphia area," neither the defendants, nor most of the other participants in the broad conspiracy perceived by the district court, actually or potentially competed. The only place in which all four defendants actually competed was Fairless, the site that is the subject of this indictment. Nor were all the various contractors from Western Pennsylvania to Philadelphia to Coatesville even "potential" competitors of each other. As the district court acknowledged (85-1942 Pet. App. 37a), at least some of the victims of the various bid-rigging schemes wanted contractors in their immediate local area to perform their work, and U.S. Steel particularly wanted contractors with steel mill experience (see also C.A. App. 325, 335). Thus, even though some companies were potential competitors at some sites because they met the customer's qualifications and might be added to a bid list on a future project (cf. 85-1942 Pet. 11), most companies included in the broad conspiracy perceived by the district court (*e.g.*, Henckels & McCoy at Lukens, Progressive at Sun Oil, Riggs-Distler at Arco, or Meade, Tico, and Fuellgraf in Western Pennsylvania) could never have qualified at most of the sites included in that conspiracy.

in this case. Cf. 85-1950 Pet. 11-12. In *United States* v. *Ashland-Warren, Inc.*, 537 F. Supp. 433 (M.D. Tenn. 1982), the court rejected defendants' claim that bid-rigging conspiracies on road-paving contracts in Tennessee and Virginia were related, reasoning in part that the contractors in Tennessee and Virginia were, for the most part, not even potential competitors of each other. 537 F. Supp. at 446. The court's analysis was similar to that employed by Judge Gibbons in this case.

Whatever its defects might be in other contexts, Judge Gibbons' approach of defining a "relevant market" is pertinent in determining the scope—as opposed to the existence—of a price-fixing conspiracy. In addition, Judge Gibbons relied on a number of factors, not tied to his "market" analysis, in determining that there were multiple conspiracies rather than one (see pp. 6-7, *supra*). Therefore, Judge Gibbons' analysis of the district court's factual findings does not present an issue warranting review by this Court.

b. Just as petitioners challenge certain statements in Judge Gibbons' opinion that were not joined by Judge Stapleton and are inessential to the court's holding, so too Lord criticizes a portion of Judge Stapleton's concurrence as "replac[ing] traditional analysis of Sherman Act conspiracies with speculative, *a priori* economic theorizing" (85-1936 Pet. 10). Judge Stapleton's observations do not warrant review. Judge Stapleton considered whether the conspirators were likely to engage in site-by-site or broad-ranging bid-rigging agreements (see 85-1942 Pet. App. 16a-17a). Judge Stapleton reviewed the evidence as a whole and concluded, first, that the record was barren of evidence as to why the conspirators would have engaged in a single broad-ranging con-

spiracy. Judge Stapleton was surely entitled to rely on "common sense and economic theory" in assessing the evidence (see *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 8-9), and there is nothing wrong with demanding evidence of motive before accepting a factual finding that economic actors behaved in a way contrary to common sense and economic theory. Viewing the evidence in its entirety, Judge Stapleton also concluded that "all of the circumstantial evidence either strongly favors or is consistent with a finding of multiple conspiracies." 85-1942 Pet. App. 17a.

c. Lord interprets Judge Gibbons' opinion to "hold[] that * * * the bid lists on each project defined the relevant market and therefore the conspiracy" (85-1936 Pet. 10; see also 85-1942 Pet. 10-11). This "holding," petitioners claim, conflicts with other decisions that have found a single conspiracy notwithstanding the existence of different bidders on different projects (85-1936 Pet. 11-12; 85-1942 Pet. 13-15). Judge Gibbons, however, did not define the conspiracies in the way petitioners claim. What Judge Gibbons stressed in his "market" analysis was that most contractors were not "qualified" and could not get on the bidders' lists at all locations (85-1942 Pet. App. 12a) and thus were not even "potential" competitors of the others bidding at those sites.

The clearly established law in the Third Circuit is that a single conspiracy may encompass bid riggers who do not all appear on a single bidders' list. *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183 (1984) (single conspiracy existed to rig bids at the Western Pennsylvania Works, despite changes in the bidders' lists from project to project), cert. denied, No. 84-1203 (Mar. 4, 1985) and No. 84-1331 (Mar.

25, 1985). Judge Gibbons took special note of *Fischbach & Moore* but expressed no disagreement with that decision (85-1942 Pet. App. 8a-9a).[16]

The decision of the court of appeals represents a holding, based on the totality of the circumstances and the entire record, that there were separate conspiracies at the Western Pennsylvania Works, at Gulf, and at Fairless. It does not overturn the prior holding of the court of appeals in *Fischbach & Moore* that a single conspiracy may involve several distinct bidders' lists. The "holding" that petitioners ask this Court to review simply does not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[16] Judge Adams, in dissent, did not suggest that Judge Gibbons' approach was inconsistent with *Fischbach & Moore*, and Chief Judge Aldisert, the author of *Fischbach & Moore*, apparently did not perceive the decision in this case as inconsistent with *Fischbach & Moore*, for he voted to deny rehearing en banc (85-1942 Pet. App. 58a-65a).

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